

GLOBAL TRADE, CONTROL OF THE SEA, AND THE U.S. & CHINA: THE TENSIONS BETWEEN ECONOMIC AND SECURITY POLICIES

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I. INTRODUCTION

Maritime trade is of the utmost importance to global economies as eighty percent of all global trade goes through the sea.¹ However, the body of law and agreements that have emerged around maritime trade and security are fragmented and of limited efficacy. There are multiple treaties, conventions, and United Nations bodies, and nonetheless there exists a code of conduct that implicitly depends on the size of a country's military.² This casts the United States in a precarious position with regards to rising tensions between China, Russia, American allies in Asia, and the United States itself. These tensions are coming to a head in the South China Sea. The area is becoming increasingly militarized and yet it continues to be incredibly important from a trade perspective. Understanding the economics, trade and security agreements, and political issues in this region will inform how the United States should ultimately act going forward.

First, this Note will discuss why the economics for maritime law are important, outlining various percentages and volumes of global trade via sea and considering which global trade routes are particularly important, especially the routes that involve China's massive trade presence. Second, this Note will cover relevant international law, international bodies, and trade agreements. Notably, it will cover the predominant security and trade agreement, the United National Convention on the Law of the Sea (UNCLOS) in detail, and will outline the other fragmented security and trade treaties and bodies. Third, this Note will discuss the politics of the

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¹ U.N. Conference on Trade and Development, *Review of Maritime Transport 2015*, at 22, U.N. Doc. UNCTAD/RMT/2015, <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1374>.

² See Ronald O'Rourke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE 3 (Sept. 18, 2015), <https://www.fas.org/sgp/crs/row/R42784.pdf>. O'Rourke refers to this as the "might makes right" principle and outlines why it is in the United States' best interest to avoid reestablishing this principle as a "routine or defining characteristic of international relations."

South China Sea. Further, it will outline the increased militarization of the South China Sea and discuss the construction of artificial islands in the region. After examining the landscape of this region from an economic, legal, and political perspective, this Note proposes specific measures that the United States can take, including joining UNCLOS, meeting China at the negotiating table, and increasing military cooperation with smaller countries in the region. As will be shown, economics, politics, and military strategy are especially intertwined in this part of the world, and any policy considerations must weigh these factors appropriately.

II. ECONOMICS OF MARITIME LAW

In a service-based economy, and especially one in which large technology companies steal many of the biggest headlines, maritime trade may seem archaic and unimportant. But the opposite is true: the sea is massive, and it remains vitally important to the world economy. Seventy percent of the Earth's surface area is covered in water,³ and, as mentioned above, 80 percent of all global trade goes through the sea.⁴

A. HISTORY OF MODERN MARITIME TRADE

On April 26, 1956, a converted United States WWII tanker, the *Ideal-X*, sailed from Newark to Houston carrying a cargo of fifty-eight truck trailers, thus starting the "Container Revolution."⁵ It took ten to twenty years for the shipping container to fully revolutionize the shipping industry, but when it became the general standard for shipping, its impact was far-reaching and dramatic.⁶

For the remainder of the twentieth century, "[c]ontainerization played a tremendously important role in the intensified economic globalization process." The basic benefits of the container were that it reduced handling costs of cargo at port, reduced the amount of time ships had to spend in port, and ultimately provided better quality shipping.⁷ It also allowed companies to store goods cheaply, and reduced theft because once the goods were packed into a container, the cargo could be "all but impregnable from quayside theft."⁸ Furthermore, when the entire transport chain was harmonized to accommodate for the shipping container, shipping companies saw a major increase in efficiency.⁹ Leading businesspeople and policymakers embraced the shipping container, allowing them to take full

3 Paul A. Tucci & Mathew T. Rosenberg, *HANDY GEOGRAPHY ANSWER BOOK* (2nd ed. 2009).

4 *Review of Maritime Transport*, *supra* note 1, at 22.

5 Michael B. Miller, *EUROPE AND THE MARITIME WORLD* 320 (1st ed. 2012).

6 *Id.*

7 Espen Ekberg et al., *Maritime entrepreneurs and policy-makers: a historical approach to contemporary economic globalization*, 10 *J. OF GLOBAL HIST.* 171, 181 (2015).

8 *Id.*

9 Miller, *supra* note 5, at 333.

advantage of increased globalization, improved communications, and new markets abroad.¹⁰

While shipping containers typically transport dry goods, the rise in shipping during the second half of the twentieth century was also due to the rise in the shipping of cars, mined goods, and oil. Car exports were miniscule before 1950, but the prospects of an untapped global automobile market prompted the industry to develop new ships specifically designed to transport fully manufactured automobiles in the 1960s.¹¹ Shipping of mined goods also dramatically increased during the 1960s. Specifically, the amount of ore being shipped in 1960 was at least four times the amount shipped in the late 1930s.¹² Additionally, oil shipping also dramatically increased due to larger tanker ships built in the 1960s and 1970s, allowing companies to benefit from economies of scale in fuel costs, personnel costs, and ship manufacturing costs.¹³

B. VOLUME OF MARITIME TRADE TODAY

Shipping containers still continue to play an important role in maritime trade, but by volume, other manufactured goods now represent the majority of maritime shipments.¹⁴ In 2014, 9.84 billion tons of goods were traded via sea, up 3.4 percent from the year before,¹⁵ from a “world commercial fleet” of 89,464 vessels.¹⁶ Two-thirds of these shipments were dry goods, and one-third was tanker trade (petroleum products, crude oil, and gas).¹⁷ Within the “dry goods” segment, the five major bulk commodities (iron ore, coal, grain, bauxite/alumina, and phosphate rock) and the other minor bulk commodities (agriculture products, metals and minerals, and manufactures) reached a total of 4.55 billion tons, which is 46 percent of all global maritime trade by volume.¹⁸ China’s demand for these raw natural resources is the main contributor to the volume of dry bulk cargo.¹⁹ Accordingly, 3.74 billion tons of dry cargo were unloaded in Asia in 2014 (or 54.8 percent of the world total), in comparison to 0.44 billion tons of dry cargo unloaded in the Americas in the same year (6.5 percent of the world total).²⁰

Chinese ports contain the most berths in the world and handle more cargo than any other country.²¹ For container shipping, Shanghai is the largest container port in the world, and seven of the ten largest ports in the

10 *Id.* at 337.

11 Ekberg, *supra* note 7, at 183.

12 Miller, *supra* note 5, at 309.

13 *Id.* at 308.

14 Ekberg, *supra* note 7, at 181.

15 *Id.*

16 *Review of Maritime Transport*, *supra* note 1, at x.

17 *Id.* at 5-7.

18 *Id.* at 7.

19 *Id.*

20 *Id.* at 9.

21 *Id.* at 69.

world are Chinese, indicating the country's status as a manufacturing hub.²² As noted above, China's demand for bulk commodities also remains important. It accounts for sixty-eight percent of the world's iron ore imports, with the vast majority coming from Australia, a country that exports fifty-four percent of the world's iron ore.²³ Furthermore, China is the world's largest importer of coal, at twenty percent of the world's coal imports (up from two percent of the world's coal imports in 2005).²⁴ Regarding coal exports, thirty-one percent of the world's coal is exported by Australia, and thirty-four percent by Indonesia.²⁵ Thus, it is unsurprising that China is the world's largest steel producer, at fifty percent of the world's steel production.²⁶ Japan and the United States, in second and third place, each produce seven percent of the world's steel.²⁷

In regards to oil transport, China's demand for crude oil is also increasing, and it is sourcing that demand from various locations, including the Caribbean, West Africa, Western Asia, and Russia.²⁸ In 2014, China's crude oil imports increased by 9.8 percent, to 5.6 million barrels a day.²⁹ Conversely, imports of crude oil into the United States fell by almost twelve percent in 2014 to 4.5 million barrels a day.³⁰ Accordingly, the percentage of world oil production in North America was second in the world, at eighteen percent, and North American oil consumption was also second in the world, at twenty-two percent.³¹

Finally, while the volumes of maritime trade are an important indicator of global maritime trade, container shipping represents more than half the value of all global maritime trade, yet is only around sixteen percent of the volume of all global maritime trade.³² By one estimate, container shipping even accounts for sixty percent of the value of all goods traded via sea.³³ Looking at the share of containerized trade globally, twenty-two percent by volume of containerized trade follows major East-West routes.³⁴ Of this, forty-two percent is trade between North America and Asia.³⁵ In sum, the volumes and values of maritime trade are impressive, and not only has the volume of maritime trade increased recently, it has grown at a faster rate than the global GDP over the past two years.³⁶

22 *Id.*

23 *Id.* at 17.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 14.

29 *Id.* at 15.

30 *Id.*

31 *Id.*

32 *Id.* at 66.

33 *The big-box game*, THE ECONOMIST (Oct. 31, 2015), <http://www.economist.com/node/21677209/print>.

34 *Review of Maritime Transport*, *supra* note 1, at 20.

35 *Id.* at 21.

36 *Id.* at Figure 1.1. The importance of maritime trading growing faster than global trading is especially impressive considering the global economic recovery has been slow over the past few years and that China's economy is cooling off.

C. VITAL TRADE ROUTES TODAY

The Indian Ocean, South China Sea, and East China Sea are all vital trade routes for the global economy.³⁷ As the respective volumes of trade would indicate, the South China Sea is home to between thirty percent and fifty percent of all global maritime trade.³⁸ Energy is an important commodity in this trade route; roughly sixty-six percent of Korea's energy supplies and sixty percent of Japan and Taiwan's energy supplies travel through the South China Sea,³⁹ China itself transports eighty percent of its crude oil through the South China Sea.⁴⁰ The South China Sea is also an important trade route for Australia. One scholar claimed that sixty percent of all Australian trade (by volume) flows through the South China Sea,⁴¹ though this was criticized by another Australian commentator as an exaggeration of the importance of the area for Australia.⁴² While the relevance of stability in the South China Sea for Australia may be contentious to some, an independent United States think tank has made clear that the "South China Sea is an important *world energy trade route*."⁴³

Especially in the context of energy transportation through the region, the second biggest "choke point" in the world is the Strait of Malacca,⁴⁴ which is between Malaysia and Singapore, and connects the Indian Ocean to the South China Sea.⁴⁵ Fifteen million barrels of oil flow through this area on a daily basis, constituting twenty-five to thirty-three percent of the world's oil.⁴⁶ According to 2011 data, when crude oil arrives at the Strait of Malacca a portion of the crude oil is refined in Singapore and Malaysia (1.4 million barrels a day), while the majority of the crude oil (the remaining

37 *Who Rules the Waves?*, THE ECONOMIST (Oct. 17, 2015), <http://www.economist.com/node/21674648/print>.

38 Dustin E. Wallace, *An Analysis of Chinese Maritime Claims in the South China Sea*, 63 NAVAL L. REV. 128, 130 (2014). *See also id.*

39 *See The South China Sea will be the battleground of the future*, BUSINESS INSIDER (Jan. 7, 2016, 5:31pm), <http://www.businessinsider.com/why-the-south-china-sea-is-so-crucial-2015-2>.

40 *See High stakes for Australia in limiting China's South China Sea incursions*, THE AGE (May 22, 2015), <http://www.theage.com.au/comment/high-stakes-for-australia-in-limiting-chinas-south-china-sea-incursions-20150521-gh6nww.html>.

41 *Id.*

42 *What are Australia's interests in the South China Sea?*, AUSTRALIAN STRATEGIC POLICY INSTITUTE (May 28, 2015), <http://www.aspistrategist.org.au/what-are-australias-interests-in-the-south-china-sea/> (arguing that commentator Bonnie Glaser's 60% of trade volume figure is an over-estimate and that Australia does not have as large an economic interest in the South China Sea as Glaser claims).

43 *The South China Sea is an important world energy trade route*, Today in Energy, U.S. ENERGY INFORMATION ADMINISTRATION (April 4, 2013), <http://www.eia.gov/todayinenergy/detail.cfm?id=10671> (emphasis added).

44 Dana Ballout, *Choke Points: Our energy access points*, <http://nationalsecurityzone.medill.northwestern.edu/oilchangeproject/choke-points/>. The largest "choke point" is the Strait of Hormuz, with 17 million barrels of oil flowing through daily.

45 The history of the city of Malacca is fraught with imperialism. Upon its founding in 1400, it became a vital link between the Pacific and the West. The Portuguese conquered the city in 1511 and used it to monopolize the trade of spices to the Mediterranean. The Dutch conquered the city in 1641 and, along with the Dutch East India Company, also monopolized the trade of spices in the area. The English took their turn in 1819 to conquer Malacca from the Dutch, and briefly during WWII the Japanese had control over the city. Its importance as a trade route is etched in history. *See Special Report: The Pacific*, THE ECONOMIST, Nov. 14, 2014.

46 Ballout, *supra* note 44. *See also* O'Rourke, *supra* note 2.

12.8 million barrels) continues through the South China Sea.⁴⁷ Of these 12.8 million barrels, the majority ends up in China (4.5 million barrels) and Japan (3.2 million barrels).⁴⁸ In sum, the amount of oil that flows through the Strait of Malacca is three times the amount that goes through the Suez Canal, and fifteen times the amount that goes through the Panama Canal.⁴⁹

Not only does crude oil travel to the South China Sea from the Gulf States, the region also has its own supply of untapped oil and natural gas stores.⁵⁰ This may help alleviate the so-called “choke point” at the Strait of Malacca for countries in the region, but it does not reduce the importance of the area as a trade route from a global economic perspective. There are seven billion barrels of oil reserves in the South China Sea, and China estimates that the South China Sea will eventually yield 130 billion barrels of oil (though there is “some serious doubt about these estimates”).⁵¹ Notably, the area also has an estimated 900 trillion cubic feet of natural gas.⁵²

From the United States’ perspective, the area is economically important because it is a direct trade route to the United States.⁵³ Specifically, \$1.2 trillion in ship-borne trade goes from the South China Sea to the United States annually.⁵⁴ Furthermore, one of the United States’ “core interests” is to expand trade and economic opportunity in the South China Sea.⁵⁵ A representative from the U. S. Pacific Command echoed this sentiment at a Senate Armed Services Committee meeting on September 17, 2015, stating that “[t]he Asia-Pacific region is critical for our nation’s economic future.”⁵⁶ Additionally, the economic future of the South China Sea is also believed to be dependent on the United States. According to Daniel Russel, Assistant Secretary of State for East Asian and Pacific Affairs (part of the Department of State), in the past seventy years many Asian countries have “grown—and continue to grow—their economies through international trade, especially trade with the U.S.”⁵⁷ The vital trade routes will play a crucial role in this economic growth.

47 *South China Sea, International energy data and analysis*, U.S. ENERGY INFORMATION ADMINISTRATION (February 7, 2013), <http://www.eia.gov/beta/international/regions-topics.cfm?RegionTopicID=SCS>. (hereafter EIA Report).

48 *Id.*

49 *The South China Sea will be the battleground of the future*, *supra* note 39.

50 *Id.*

51 *Id.*

52 See Department of Defense, *The Asia-Pacific Maritime Security Strategy: Achieving U.S. National Security Objectives in a Changing Environment*, at 5, http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF

53 O’Rourke, *supra* note 2, at 5 n.11.

54 *Id.*

55 *Asia-Pacific Rebalance 2025, Capabilities, Presence, and Partnerships*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Jan. 19, 2016), at 10, <http://csis.org/publication/asia-pacific-rebalance-2025>. The other two core interests in the area are to “protect the security of the American people and U.S. allies” and to support “universal democratic norms.”

56 O’Rourke, *supra* note 2, at 71.

57 *Id.* at 73.

III. LEGAL ISSUES

To understand the legal issues facing the South China Sea, one must look at the intersection of both *security* laws and agreements and *trade* laws and agreements.

A. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

“China navy China navy we are an Australian aircraft exercising international freedom of navigation rights, in international airspace in accordance with the international civil aviation convention, and the United Nations Convention on the Law of the Sea – over.”

- Australian pilot on a surveillance mission over South China Sea, December 15, 2015⁵⁸

The United Nations Convention on the Law of the Sea (UNCLOS) is the dominant legal doctrine in maritime law from both a security and a trade perspective.⁵⁹ Work on the current UNCLOS began in the mid-1960s (due to the emergence of a “super-power rivalry” in the oceans) when the Third United Nations Conference on the Law of the Sea officially convened in 1973.⁶⁰ After nine years of negotiations, the conference produced a final agreement in 1982, which came into effect on November 16, 1994.⁶¹ Its purpose was to allow countries to ship goods and pass through territorial waters of another country, so long as the passage was not detrimental to the other country and did not create a security threat.⁶² Tommy Koh, who was the president of the UNCLOS in the 1980s, called it “a constitution for the oceans.”⁶³

The UNCLOS has many important features, but among the most important are the size of each country’s territorial waters, the rules for passage of ships through such waters, and the provision of each country’s Exclusive Economic Zone (EEZ).⁶⁴ Initially, there was disagreement over the appropriate size of each country’s territorial water.⁶⁵ Proponents of a twelve mile territorial sea were smaller countries which wanted to protect their coastlines; opponents of the twelve mile territorial sea were primarily

⁵⁸ *Australia conducting 'freedom of navigation' flights in South China Sea*, BBC News (Dec. 15, 2015), <http://www.bbc.com/news/world-australia-35099445>.

⁵⁹ *In Deep Water*, THE ECONOMIST (Feb. 22, 2014), <http://www.economist.com/node/21596990/print>.

⁶⁰ United Nations, *The United Nations Convention on the Law of the Sea (A historical perspective)*,

http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm. [hereinafter *UNCLOS History*].

⁶¹ *Id.*

⁶² *Id.*

⁶³ *In Deep Water*, *supra* note 59.

⁶⁴ *UNCLOS History*, *supra* note 60.

⁶⁵ *Id.* Interestingly, in the 18th Century, the “cannon shot” rule was the accepted convention, where a country’s naval territory extended “as far as projectiles could be fired from a cannon based on the shore.” According to some scholars, this is the basis for the 3-mile nautical territory that the major maritime powers would advocate for during the UNCLOS negotiations. *See id.*

the major maritime powers, because it could limit the movement of their large naval fleets.⁶⁶ The major maritime powers instead advocated for a three mile territorial zone, which would open up many of the world's most crucial and most narrow passages, including the aforementioned Strait of Malacca (twenty miles wide, providing the link between the Indian Ocean and South China Sea), the Strait of Gibraltar (eight miles wide, providing access from the Atlantic to the Mediterranean Sea), the Strait of Hormuz (twenty-one miles wide, serving as the sole naval access point to the Gulf States) and Bab el Mandeb (fourteen miles wide, linking the Indian Ocean and the Red Sea).⁶⁷

These competing interests also divided the major naval powers of the 1970s (the United States and the Soviet Union) and the smaller coastal states when it came to determining rules of passage through territorial waters.⁶⁸ The coastal states advocated for a regime of "innocent passage" wherein foreign warships would only be able to pass through territorial seas if it was "not prejudicial to the peace, good order or security of the coastal State."⁶⁹ The United States and the Soviet Union rejected this regime, because under "innocent passage" military flights would not be able to fly over these waters, and submarines would have to surface and bear their national flag as they passed through territorial seas.⁷⁰ Both of these requirements were seen as unacceptable security risks.⁷¹

Both sides compromised on a regime called "transit passage," which combined "the legally accepted provisions of innocent passage through territorial waters and freedom of navigation on the high seas."⁷² Under "transit passage," the 12-mile territorial sea was recognized even at the contentious narrow points, but the global naval powers retained their ability to navigate military ships and submarines through such waters. Transit passage, however, mandates that all ships going through territorial seas must do so without delay and without stopping, must observe international regulations for air-traffic control, navigational safety, and pollution, and must refrain from any threat or use of force against the coastal state whose waters they navigate through.⁷³

Under the current UNCLOS agreement, both the "Transit Passage" and the "Innocent Passage" regimes still exist.⁷⁴ With "Transit Passage," a ship or aircraft that is going from "one part of the high seas or an exclusive economic zone" to another "part of the high seas or an exclusive economic

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982), [hereinafter UNCLOS Law of the Sea] https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en.

zone” can do so without being impeded, and can do so under “normal modes of continuous and expeditious transit,” provided the ship also meets the criteria mentioned in the previous paragraph (no delay, no threat of force, and compliance with generally accepted international regulations for safety and pollution).⁷⁵ The “normal modes of continuous and expeditious transit” provision is important for military vessels like submarines because it means that these vessels do not have to surface and bear a national flag.⁷⁶ In practice, submarines can remain submerged while they navigate through another country’s twelve mile territorial sea.⁷⁷

The scope of “Innocent Passage” is everything that is not included under “Transit Passage.”⁷⁸ This basically codifies the preexisting international maritime practice of freedom of navigation.⁷⁹ The UNCLOS also outlines what is specifically not allowed under “Innocent Passage,” including disallowing ships from showing any threat of force against the coastal state, exercising or practicing with any weapons, collecting any information “to the prejudice of the defence or security of the coastal State,” launching or taking aboard any aircraft or military device, carrying out research or fishing activities, and other actions.⁸⁰

The Exclusive Economic Zone (EEZ) enacted under the UNCLOS plays a key part in maritime trade policy because it gives countries economic rights over the water extending 200 miles from their coasts.⁸¹ By definition, the EEZ is “an area beyond and adjacent to the (country’s) territorial sea, subject to the specific legal regime established” by the UNCLOS.⁸² Within its EEZ, a country has the exclusive right of “exploring and exploiting, conserving and managing the natural resources,” and has jurisdiction with regard to the “establishment and use of artificial islands, installations and structures,” “marine scientific research,” and “the protection and preservation of the marine environment.”⁸³ Especially with the promise of natural resources and fossil fuels in the South China Sea, the provision of EEZs is incredibly important to both small and large countries in the region.

The UNCLOS also mandates important rules around Archipelagic states. Archipelagic states are states of one or more archipelagos, or a “group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.”⁸⁴ The UNCLOS provides the terms under which an archipelagic state can

75 *Id.* at Art. 37-39.

76 *See id.*

77 *See id.*

78 *Id.* at Art. 39.

79 *Id.* at Art. 31.

80 *Id.* at Art. 31.

81 *UNCLOS History*, *supra* note 60.

82 *UNCLOS Law of the Sea*, *supra* note 74.

83 *Id.*

84 *Id.* at Art. 40.

draw its borderlines, which is especially relevant for the South China Sea because there are many groups of islands in the area.⁸⁵ However, under the UNCLOS, the land must be above water at high tide in order to be considered an island,⁸⁶ and the island must be habitable for the sovereign state to be able to claim an EEZ around the perimeter of the island.⁸⁷ Islands that are uninhabitable are given a twelve mile territorial sea, but not an EEZ.⁸⁸

Artificial islands are also important in the South China Sea. The UNCLOS neither defines what qualifies as an artificial island, nor does it give an indication that artificial islands get any additional economic rights (like a territorial sea or an EEZ).⁸⁹ The UNCLOS's silence on artificial islands is a reason for the confusion over newly built islands in the South China Sea.

Like other major international laws, countries had to ratify the UNCLOS in order for it to become law. Currently, there are 167 countries that are members of the UNCLOS, including major European powers (Germany, the United Kingdom, France), China, Russia, and other countries adjacent to the South China Sea (namely South Korea, Japan, Singapore, the Philippines, Vietnam, Thailand, Malaysia, and others).⁹⁰ As members of the UNCLOS, these countries not only agree to abide by the aforementioned rules, but they also agree to be bound by extensive tribunal and arbitration processes as well.⁹¹

In today's environment, it is remarkable that the United States is not a party to the current UNCLOS.⁹² While the United States was a leader in drafting the UNCLOS, a later amendment to the UNCLOS around deep-sea mining was seen as counter to the United States' interests, and the United States did not sign the amended "Law of the Sea" in 1994.⁹³ There has been a recent push by John Kerry to make the United States a party,⁹⁴ and some leading experts believe the U.S. should join.⁹⁵ The concern is that by not being a member of the UNCLOS, the United States undermines its

85 *Id.*

86 *Id.* at art. 121.

87 Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J. INT'L L. 142, 151 (2013).

88 *Id.*

89 *Id.* n. 62.

90 UNCLOS Law of the Sea, *supra* note 74.

91 *Id.* at Annex VI and VII.

92 *Id.*

93 Candace Bates, Comment, *U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance Is Not Enough to Protect U.S. Property Interests*, 31 N.C.J. INT'L L. & COM. REG. 745, 763 (2006).

94 Mark Landler, *Law of the Sea Treaty Is Found on Capitol Hill, Again*, NY TIMES, May 23, 2012, <http://www.nytimes.com/2012/05/24/world/americas/law-of-the-sea-treaty-is-found-on-capitol-hill-again.html?ref=topics&r=0>.

95 David D. Caron, *The U.S. Must Ratify the Law of the Sea Treaty*, NY TIMES, May 19, 2015, <http://www.nytimes.com/roomfordebate/2015/05/19/global-priorities-in-the-arctic/the-us-must-ratify-the-law-of-the-sea-treaty>.

authority, and does not possess a legitimate forum to resolve disputes in the South China Sea or the Arctic.⁹⁶

Regardless, the United States remains an enforcing party of the UNCLOS,⁹⁷ promoting general stability in the South China Sea. It has pledged to continue to enforce critical aspects of the UNCLOS, especially the freedom of navigation (FON).⁹⁸ FON activities help promote adherence to the UNCLOS because when a U.S. ship travels through waters that another country believes are sovereign—yet are disputed under UNCLOS—the U.S. implicitly debunks that country’s claim to the territory.⁹⁹ The UNCLOS also officially recognizes the importance of Freedom of Navigation missions, stating in its Transit Passage section that:

Transit passage means the exercise in accordance with this Part of the *freedom of navigation* and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.¹⁰⁰

Other activities that the U.S. military currently takes part in in the South China Sea include “(U.S. Navy) ship patrols, interactions with other vessels at sea, calls on foreign ports, and USAF flights and patrols in international airspace,” all of which also help enforce the UNCLOS.¹⁰¹

B. THE INTERNATIONAL MARITIME ORGANIZATION

The International Maritime Organization (IMO) is another regulatory agency (like the UNCLOS) that plays an important role in maritime security by promulgating new rules for maritime security.¹⁰² It is a United Nations specialized agency which works closely with the U.N. but is considered to have its own separate legal personality.¹⁰³ When the IMO was founded in 1948 as a consultative organization, it was called the Intergovernmental Maritime Consultative Organization (IMCO), but as its responsibilities grew, it was renamed the International Maritime Organization (IMO) in 1982.¹⁰⁴ Today, “its work is aimed at improving the safety and security of international shipping as well as controlling marine pollution from ships.”¹⁰⁵

⁹⁶ *Id.*

⁹⁷ *Your rules or mine?*, THE ECONOMIST, Nov. 15, 2014, <http://www.economist.com/news/special-report/21631792-trade-depends-order-sea-keeping-it-far-straightforward-your-rules-or>.

⁹⁸ Karen Brooks, *A Security Message for the South China Sea*, COUNCIL ON FOREIGN RELATIONS, Aug. 4, 2015, <http://www.cfr.org/asia-and-pacific/security-message-south-china-sea/p36866>. See also Department of Defense, *supra* note 52, at 2.

⁹⁹ See *Asia-Pacific Rebalance 2025*, *supra* note 55, at 43.

¹⁰⁰ UNCLOS Law of the Sea, *supra* note 74, at Art. 38 par. 2 (emphasis added).

¹⁰¹ *Asia-Pacific Rebalance 2025*, *supra* note 55, at 42.

¹⁰² Felicity Attard, IMO’s Contribution to International Law Regulating Maritime Security, 45 J. MAR. L. & COM. 479, 494 (2014).

¹⁰³ *Id.* at 481.

¹⁰⁴ *Id.* at 482.

¹⁰⁵ *Id.* at 481.

The IMO has 171 member states, including the United States, China, and Russia.¹⁰⁶ It provides a forum for member states to discuss issues facing maritime law and debate new rules proposed by the IMO.¹⁰⁷ However, the IMO has no enforcement capabilities for the vast majority of its rules (the sole exception is the IMO Convention on Standards for Training, Certification, and Watch-keeping for Seafarers), so its rules must be enforced by member states that choose to incorporate them into domestic law.¹⁰⁸ IMO rules are contained in either “treaty” instruments, or “non-treaty” instruments, where “treaty” instruments will be legally binding on member states who agree to be bound, and “non-treaty” instruments are generally recommendations, codes, and guidelines that can be adopted, modified, or dismissed by member states.¹⁰⁹

C. KEY TREATY INSTRUMENTS ADOPTED BY IMO MEMBER STATES

The IMO’s International Convention for Safety of Life at Sea (SOLAS) is one of the IMO’s key treaties, and is generally regarded as the most important treaty concerning the safety of merchant ships.¹¹⁰ At its core, SOLAS regulates standards for construction and operation of ships.¹¹¹ Its 1974 amendment includes a mechanism for automatic adoption by member states that do not object to revisions to the treaty.¹¹² After the September 11 attacks, the IMO undertook several initiatives to improve maritime security, showing an increasing willingness of the IMO to write rules dealing with security, in addition to maritime safety.¹¹³ SOLAS was amended (a new chapter XI-2 was added) to require that member states meet certain security requirements in their ports and on ships that fly their national flag.¹¹⁴ Ships were required to carry an Automatic Identification System, show an IMO Ship Identification Number on the outside of the ship, and maintain a security alert system.¹¹⁵ Ports were required to conduct a security assessment and potentially appoint a security officer.¹¹⁶ Implementing this plan was largely successful, with eighty-six percent of vessels and sixty-nine percent of port facilities compliant by the July 2004 deadline.¹¹⁷ This is an important example of the international maritime community working together to implement security regulations that benefit all.

¹⁰⁶ *Member States*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx> (last visited Dec. 16, 2015).

¹⁰⁷ Attard, *supra* note 102, at 486-87.

¹⁰⁸ *Id.* at 488.

¹⁰⁹ *Id.* at 487.

¹¹⁰ *International Convention for the Safety of Life at Sea (SOLAS)*, INTERNATIONAL MARITIME ORGANIZATION, [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx) (last visited Sept. 6, 2016).

¹¹¹ Attard, *supra* note 102, at 489, 493.

¹¹² *Id.*

¹¹³ Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 TUL. MAR. L. J. 1, 16-17 (2006).

¹¹⁴ Attard, *supra* note 102, at 518.

¹¹⁵ Balkin, *supra* note 113, at 18.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 20-21.

Another major treaty of the IMO is the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), which came into force on March 1, 1992.¹¹⁸ It serves as a broad justification for countries to arrest and detain offenders of certain categories of violent acts, provided they are committed aboard a ship and in the country's territorial waters.¹¹⁹ It was enacted in order to prevent persons who commit unlawful acts from finding a safe haven in the sea from their illegal actions.¹²⁰ In 2005, the SUA Convention was revised, expanding the crimes that fall under the convention to include "uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage" and "uses a ship in a manner that causes death or serious injury or damage," among other new crimes.¹²¹ These new crimes are an indication of the IMO's focus on crimes of terrorism and security issues, and not just safety regulations for trading ships.¹²²

However, the SUA Convention, as with many of the other rules by the IMO, does not regulate military ships.¹²³ Therefore, while the organization is playing a more important role in maritime security by going beyond the reach of some UNCLOS provisions, their provisions can only go so far when military ships are involved.

D. TRADE POLICIES

While the IMO was created to focus on safety and later security issues facing the shipping industry, a second field of politics focuses solely on the commercial side of maritime law.¹²⁴ The United Nations Conference on Trade and Development Code (UNCTAD Code) is a dominant international body for trade policy, serving as the UN's primary mechanism for controlling trade and development.¹²⁵ The first meeting of UNCTAD was in 1964, and since then it has put together numerous agreements, which aim to stabilize the price of export products, control restrictive business practices (today known as "Trade and Competition Policies"), and improve the ability of developing countries to establish their own merchant fleets.¹²⁶ The most controversial and revolutionary part of the UNCTAD Code was a market-sharing formula (called the Liner Code), which, under a 40:40:20 formula, mandated that when two countries engage in trade, both countries

¹¹⁸ *Id.* at 7-8.

¹¹⁹ *Id.* at 22-23.

¹²⁰ *Id.* at 8.

¹²¹ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 U.N.T.S. 222, Art. 2. (Mar. 10, 1988), <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf>. *See also id.* at 8.

¹²² Balkin, *supra* note 113, at 26-27.

¹²³ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 121, at Art. 2. *See also id.* at 8.

¹²⁴ Ekberg, *supra* note 7, at 187.

¹²⁵ Patrick J.S. Griggs, *Uniformity of Maritime Law-an International Perspective*, 73 TUL. L. REV. 1551, 1558 (1999).

¹²⁶ *A Brief History of the UNCTAD*, United Nations Conference on Trade and Development, <http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx>.

must ship forty percent of the cargo, with the final twenty percent remaining open to a third country.¹²⁷ This was officially adopted in 1974, but the adoption of subsequent legislation by various countries has essentially eclipsed the Liner Code so that it is no longer in force.¹²⁸

Another large international body for maritime trade is the United Nations Commission on International Trade Law (UNCITRAL). Created in 1966, it is not primarily a policymaking body, but it has drafted legal instruments that affect international shipping.¹²⁹ According to its mandate, it prepares and promotes “new international conventions, model laws and uniform laws and . . . the codification and wider acceptance of international trade terms, provisions, customs and practices.”¹³⁰ Furthermore, the UNCITRAL is mandated to establish and maintain “a close collaboration with the United Nations Conference on Trade and Development.”¹³¹

Unsurprisingly, the current landscape of international trade agreements for the shipping industry is fragmented and convoluted.¹³² There are multiple agreements between nation states. The four primary agreements are the Hague Rules, the Visby Rules, the Hamburg Rules, and the Rotterdam Rules.¹³³ The Hague Rules were negotiated and adopted in the 1920s by private actors for countries, and created rules for liability and uniform measurements of cargo.¹³⁴ They were widely adopted by the international community, including the United States.¹³⁵ The Visby Rules were negotiated in the 1950s, updating the Hague Rules to account for containerization and creating policies that favored traders (not shippers), but were only adopted by thirty-three countries worldwide.¹³⁶ The Hamburg Rules, a trade agreement that is still relevant in today’s landscape, was negotiated in 1978 and came into effect in 1992.¹³⁷ The agreement was negotiated with the assistance of UNCTAD and UNCITRAL, creating a mandatory liability regime that favored shippers. However, only thirty-four countries adopted the agreement (not including the United States and many European maritime countries).¹³⁸ The most recent agreement was the Rotterdam Rules, which was negotiated in 2008, but has yet to be ratified by enough countries in order to take effect (though the United States has

127 Lijun Zhao, *Uniform Seaborne Cargo Regimes -- A Historical Review*, 46 J. MAR. L. & COM. 133, 152-53 (2015).

128 *Id.* at 153 n.172. “According to WTO Doc. S/NGMTS/4 (1995-1996), the Liner Code is not yet working in practice.” See also *The Beginning and the End of the UNCTAD Code of Conduct*, MARITIMELOGISTICS.CO (June 3, 2014), <http://www.maritimelogistics.co/the-beginning-and-the-end-of-the-unctad-code-of-conduct-liner-shipping/>.

129 Griggs, *supra* note 125, at 1559.

130 United Nations Commission on International Trade Law, *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (Jan. 2013), <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>.

131 *Id.*

132 Zhao, *supra* note 127, at 170.

133 *Id.* at 134-35.

134 *Id.*

135 *Id.*

136 *Id.* at 157.

137 *Id.* at 158, 161.

138 *Id.* at 161.

signed the agreement).¹³⁹ The Rotterdam Rules would create a system for “service contracts” that allows parties to contract out of previously mandatory liability schemes.¹⁴⁰

E. TRANS-PACIFIC PARTNERSHIP

While the Trans-Pacific Partnership (TPP) has not been ratified by the United States Congress, it is an important part of the trade landscape in the region. According to the Office of the United States Trade Representative’s official website, “TPP is a platform for engagement and growth in the Asia-Pacific Region. It solidifies relationships with our allies and firmly establishes the United States as a leader in the Pacific.”¹⁴¹ Of the twelve countries that signed the agreement on February 4, 2016,¹⁴² notable signees for the South China Sea and Southeast Asia region are Japan, Singapore, Brunei, Vietnam, Malaysia, Australia, and New Zealand.¹⁴³ The deal is remarkable for its scale and the amount of time that went into negotiations—together the countries that signed the agreement have a combined annual GDP of twenty-eight trillion dollars (which is around forty percent of the global GDP), and negotiations for the deal lasted ten years.¹⁴⁴

At a high level, the deal reduces tariffs and quotas on many goods, creates standards for environmental protection, labor, and intellectual property, addresses issues around data flowing between countries, and promotes the service industry.¹⁴⁵ In its full text, the deal outlines trade schedules for numerous goods, and the level of specificity is impressive.¹⁴⁶ For example, in the Tariff Commitments, US Appendix A Tariff Rate Quotas, the TPP outlines the quantity of certain goods that the United States will accept from other countries without imposing any tariff.¹⁴⁷ To put this in perspective, under the TPP, the United States would allow 3,000 metric tons of beef originating in Japan to be imported without tariff in year one, 3,250 metric tons in year two, and 3,500 metrics tons in year three.¹⁴⁸

Considering the United States’ long history of trading goods with Asian countries, the provisions around trade of physical goods may seem,

¹³⁹ *Id.* at 166.

¹⁴⁰ *See generally id.*

¹⁴¹ *The Trans-Pacific Partnership*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/tpp/> (last visited Sept. 6, 2016).

¹⁴² *See Trans Pacific Partnership trade deal signed in Auckland*, BBC NEWS (Feb. 4, 2016), <http://www.bbc.com/news/business-35480600>.

¹⁴³ *Id.* The full list of countries that signed the TPP is: the United States, Japan, Malaysia, Vietnam, Singapore, Brunei, Australia, New Zealand, Canada, Mexico, Chile and Peru. *TPP: What is it and why does it matter?*, BBC NEWS (Feb. 3, 2016), <http://www.bbc.com/news/business-32498715>.

¹⁴⁴ Kevin Granville, *The Trans-Pacific Partnership Trade Accord Explained*, NY TIMES, <http://www.nytimes.com/2015/10/06/business/international/the-trans-pacific-partnership-trade-deal-explained.html> (last updated Aug. 20, 2016).

¹⁴⁵ *Id.*

¹⁴⁶ *See TPP Full Text*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited Sept. 6, 2016).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

intuitively, to be the cornerstone of the deal, but in the long term, it is the TPP's provisions around trade of services that have been touted as the most important part of the deal.¹⁴⁹ Opening up the trade of services between the countries in the deal is important because “[s]uch services account for an enormous share of GDP and employment in most rich countries, but only a tiny sliver of trade.”¹⁵⁰ The deal outlines procedures for encouraging open trade of many such services. For professional services, it recommends that the countries to the TPP “encourage its relevant bodies to establish dialogues with the relevant bodies of other Parties, with a view to recognising professional qualifications, and facilitating licensing or registration procedures” and “encourage its relevant bodies to take into account agreements that relate to professional services.”¹⁵¹ Made possible through informational technology, the international trade of services may be a large source of increased trade between the countries in the TPP, and could provide opportunity for new growth for these countries' economies.¹⁵²

The press surrounding the deal has made clear that it has many opponents. The prominent economist Paul Krugman initially opposed the deal, implying that because of increased intellectual property protections for the pharmaceutical industry and entertainment industry, the deal would benefit the rich at the expense of the poor,¹⁵³ though his later posts seemed to show he is warming up to the TPP.¹⁵⁴ Another prominent economist, Joseph Stiglitz, called the deal “what may turn out to be the worst trade agreement in decades,” noting that the deal would “reward the powerful and punish the weak.”¹⁵⁵ In how the deal will reward the powerful, it seems that Mr. Stiglitz blames U.S. corporations writing the rules that govern global trade, and the fact that the deal would simply prolong the status quo.¹⁵⁶ Opposition to the deal is also widespread on the campaign trail of the 2016 U.S. Presidential Election. Hillary Clinton¹⁵⁷ and Bernie

149 *A Servicable Deal*, THE ECONOMIST (Nov. 14, 2015), <http://www.economist.com/news/finance-and-economics/21678253-tpp-intended-spark-boom-trade-services-it-will-be-decades>.

150 *Id.*

151 Trans Pacific Partnership, Chapter 10 Cross-Border Trade in Services, <https://ustr.gov/sites/default/files/TPP-Final-Text-Cross-Border-Trade-in-Services.pdf> (last visited Sept. 6, 2016).

152 *A Servicable Deal*, *supra* note 149.

153 *TPP at the NABE*, Opinion Pages, NY TIMES (Mar. 11, 2015), <http://krugman.blogs.nytimes.com/2015/03/11/tpp-at-the-nabe/>.

154 Paul Krugman, *TPP Take Two*, NY TIMES (Oct. 6, 2015), <http://krugman.blogs.nytimes.com/2015/10/06/tpp-take-two/>.

155 Joseph Stiglitz, *In 2016, let's hope for better trade agreements - and the death of TPP*, THE GUARDIAN (Jan. 10, 2016, 7:36 AM), <http://www.theguardian.com/business/2016/jan/10/in-2016-better-trade-agreements-trans-pacific-partnership..>

156 *Id.*

157 Dan Merica & Eric Bradner, *Hillary Clinton comes out against TPP trade deal*, CNN POLITICS (Oct. 7, 2015, 5:24 PM), <http://www.cnn.com/2015/10/07/politics/hillary-clinton-opposes-tpp/>.

Sanders,¹⁵⁸ have both openly opposed the deal, and Ted Cruz has also called the deal “deeply concerning.”¹⁵⁹

On the other side, many major American corporations are in favor of the TPP,¹⁶⁰ and tout that it simplifies trade, protects intellectual property, and promotes the rule of law (specifically for workers rights).¹⁶¹ The U.S. Chamber of Commerce issued a press release in favor of the TPP.¹⁶² Another proponent of the deal, Gary Clyde Hufbauer, a fellow at the Peterson Institute for International Economics (a think-tank), wrote that it would increase real incomes in the U.S. by \$131 billion annually and would increase American exports by 9.1 percent.¹⁶³ Mr. Hufbauer outlines that some of the more contentious issues with the TPP involve intellectual property protection, currency valuation, and rules of dispute resolution, yet makes the argument that even in light of some potential shortcomings in these areas, the deal is good for the United States and should be implemented by Congress.¹⁶⁴

At present, the deal is not in effect. After the TPP’s February 4, 2016 signing in New Zealand, the next step is for the agreement to go to Congress to be put into law: Congress must write implementing legislation pursuant to its Trade Promotion Authority, at which point the TPP would become United States law.¹⁶⁵ If the TPP does become law, it would be an important step towards boosting the United States’ trade presence in Asia, and as power struggles in Southeast Asia revolve around international trade, this is vital to the United States’ interests from both an economic and security perspective.¹⁶⁶ “The fact is that East Asia is all about trade and business.”¹⁶⁷

IV. POLITICAL ISSUES

There are a number of growing political issues in maritime law in the South China Sea, East China Sea, and the Indian Ocean. Three major superpowers (U.S., China, and Russia) are all making plays for power,¹⁶⁸

¹⁵⁸ Ross Barkan, *Bernie Sanders Calls Agreement of Trans-Pacific Partnership ‘Disastrous’*, THE OBSERVER (Oct. 10, 2015, 9:08 AM), <http://observer.com/2015/10/bernie-sanders-calls-agreement-of-trans-pacific-partnership-disastrous/>.

¹⁵⁹ Elaina Plott, *Ted Cruz’s Protectionist Gamble*, NATIONAL REVIEW (Nov. 24, 2015, 4:00 AM), <http://www.nationalreview.com/article/427539/ted-cruz-tpp-opposition-gamble>.

¹⁶⁰ About, U.S. COALITION FOR TPP, <http://tppcoalition.org/about/> (last visited Feb. 6, 2016).

¹⁶¹ *Id.*

¹⁶² *U.S. Chamber Statement of Support for the Trans-Pacific Partnership*, U.S. CHAMBER OF COMMERCE (Jan. 6, 2016 11:00 AM), <https://www.uschamber.com/press-release/us-chamber-statement-support-the-trans-pacific-partnership>.

¹⁶³ Gary C. Hufbauer & Cathleen Cimino-Isaacs, *Why the Trans-Pacific Partnership isn’t a bum deal*, PBS NEWSHOUR (Feb. 5, 2016, 4:39 PM), <http://www.pbs.org/newshour/making-sense/column-why-the-trans-pacific-partnership-isnt-a-bum-deal/>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Robert D. Kaplan, *ASIA’S CAULDRON 15* (1st ed. Random House 2014).

¹⁶⁷ *Id.*

¹⁶⁸ See *Who Rules the Waves?*, *supra* note 37.

smaller countries in the region are building their militaries,¹⁶⁹ and the future security of this area is an open question.

A. MILITARY EXERCISES AND INCREASING MILITARIZATION OF SOUTHEAST ASIA

Countries in the region have been conducting more frequent military exercises, especially in the South China Sea, and recent developments are troubling to some. The United States still has the largest navy, but China and Russia are currently increasing their naval capabilities.¹⁷⁰ According to the Department of Defense, “China is modernizing every aspect of its maritime-related military and law enforcement capabilities, including its naval surface fleet, submarines, aircraft, missiles, radar capabilities, and coast guard.”¹⁷¹ Although (as the Department of Defense notes) quantity is only one part of overall naval capability, the People’s Liberation Army Navy now has more vessels in Asia than any other country.¹⁷² Its fleet can be divided into two separate types of vessels: Naval Combatants (large and small combatants, amphibs, and submarines) and Maritime Law Enforcement vessels (large and small vessels).¹⁷³ In total, China has 303 Naval Combatants in the region and 205 Maritime Law Enforcement vessels, while the next-largest fleet is Japan, at sixty-seven Combatant and seventy-eight Enforcement vessels.¹⁷⁴

As a response, the United States Military is planning to expand its military exercises in this area, by working with allies like Japan, Korea, the Philippines, Indonesia, Malaysia, and Vietnam.¹⁷⁵ It has several regular maritime exercises with Japan, Korea, and the Philippines, and is expanding engagements with Indonesia, Malaysia, and Vietnam.¹⁷⁶ On the other hand, China and Australia recently held a naval exercise together, even though the United States patrols the same waters.¹⁷⁷ This is a manifestation of the risk of armed conflict between the United States and China,¹⁷⁸ a risk that became even more palpable recently when the United States sent a Destroyer patrol boat through waters close to within 12 miles of one of China’s newly constructed artificial islands on October 27, 2015.¹⁷⁹ The United States claimed the October mission was not a military

169 Kaplan, *supra* note 166, at 34–35.

170 *Id.* See also Department of Defense, *supra* note 52, at 10, 26.

171 Department of Defense, *supra* note 52, at 10.

172 *Id.*

173 *Id.* at 12, 14.

174 *Id.* at 12–13.

175 *Id.* at 24.

176 *Id.*

177 Daniel Hurst, *Australia-China naval exercises still on despite US patrol in South China Sea*, THE GUARDIAN (Oct. 29, 2015), <http://www.theguardian.com/world/2015/oct/29/australia-china-naval-exercises-still-on-despite-us-patrol-in-south-china-sea>.

178 Bonnie S. Glaser, *Armed Clash in the South China Sea*, Council on Foreign Relations (Apr. 2012), <http://www.cfr.org/world/armed-clash-south-china-sea/p27883>.

179 *An American warship sails through disputed waters in the South China Sea*, THE ECONOMIST (Oct. 27, 2015), <http://www.economist.com/node/21676983/print>. See also Euan McKirdy

exercise, but instead was a “Freedom of Navigation” operation,¹⁸⁰ but China called the exercise “extremely irresponsible.”¹⁸¹ China generally finds such military voyages illegal under UNCLOS because they are military exercises that violate the principle of “innocent passage.”¹⁸²

The irony of the October 27, 2015 operation is that, while the “Freedom of Navigation” was a major interest in passing UNCLOS, because the United States is not a party to the convention, it is playing by rules it is not bound by.¹⁸³ However, on the other side of the coin, UNCLOS does not recognize twelve-mile territorial seas and 200-mile EEZs for artificial islands, so the legal position of these islands is unclear.¹⁸⁴ Regardless, to interpret the meaning of the United States Navy’s actions in conducting this exercise, Bonnie Glaser, Senior Advisor at the Center for Strategic and International Studies (a think-tank), notes that it is not valid to accuse the United States military of *implicitly* granting China a twelve-mile territorial sea around the artificial islands by conducting this Freedom of Navigation voyage.¹⁸⁵ As Ms. Glaser notes:

Contrary to the claims of many experts, the *USS LASSEN* (DDG 82) operation was not intended to assert that the U.S. challenges the existence of a territorial sea around Subi Reef. Rather, it was intended to exercise freedom of navigation consistent with international law and to demonstrate that China’s building of artificial islands will not change how the U.S. operates in the waters and airspace of the South China Sea.¹⁸⁶

Other countries in the region are also increasing their military capacities, further changing the political and military landscape of the region. It is anticipated that India, South Korea, and Vietnam will each acquire six additional submarines by 2020, and Australia is also increasing its submarine fleet, planning to acquire twelve additional submarines within the next twenty years.¹⁸⁷ Malaysia is increasing its military capacity, with “defense spending [that] has more than doubled since 2000.”¹⁸⁸ Singapore, not to be left out of the arms race, already has “twenty missile-carrying ships, six frigates, and . . . six submarines,” which is more than

& Katie Hunt, *Showdown in the South China Sea: How did we get here?*, CNN.COM (Oct. 28, 2015), <http://www.cnn.com/2015/10/28/asia/china-south-china-sea-disputes-explainer/>.

¹⁸⁰ Jonathan Masters, *A U.S. Naval Signal in the South China Sea*, Interview with Capt. Sean Liedman, COUNCIL ON FOREIGN RELATIONS (Oct. 28, 2015), <http://www.cfr.org/china/us-naval-signal-south-china-sea/p37185>.

¹⁸¹ *Id.*

¹⁸² Adam Klein & Mira Rapp-Hooper, *Freedom of Navigation Operations in the South China Sea: What to Watch For*, LAWFARE BLOG (Oct. 23, 2015, 3:37 PM), <https://www.lawfareblog.com/freedom-navigation-operations-south-china-sea-what-watch>.

¹⁸³ See *UNCLOS History*, *supra* note 60.

¹⁸⁴ Bonnie S. Glaser & Peter A. Dutton, *The U.S. Navy’s Freedom of Navigation Operation around Subi Reef: Deciphering U.S. Signaling*, THE NATIONAL INTEREST (Nov. 6, 2015), <http://nationalinterest.org/feature/the-us-navy%E2%80%99s-freedom-navigation-operation-around-sub-reef-14272>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Kaplan, *supra* note 166, at 35.

¹⁸⁸ *Id.*

larger countries (by population) in the region like Indonesia, Malaysia, and Vietnam.¹⁸⁹ South Korea's increased militarization is not limited to submarines either: it decided in 2006 to more than double its defense expenditures by 2015 to reach \$1.24 trillion.¹⁹⁰ It has invested in six new Sejong-class destroyers and multiple new military aircrafts.¹⁹¹ According to Robert Kaplan, journalist and defense consultant, "Asia's arm race may be one of the most underreported stories in the elite media in decades."¹⁹²

The United States Navy is working with many of these countries to bolster their naval capacities and to increase American naval presence in the region. In regards to Singapore, four of its air squadrons regularly train in the United States, and in 2011 there were 150 visits by American warships to the country.¹⁹³ Aside from engaging in training and visits, in 1998, Singapore built the Changi Naval Base "solely to host American nuclear-powered aircraft carriers and submarines."¹⁹⁴ In Malaysia, American warships visit the country fifty times per year, the two countries' military forces have trained together, and the U.S. has given Malaysia "tens of millions of dollars of radar equipment for use in the South China Sea under the guise of the global war on terrorism."¹⁹⁵ Vietnam is another ally of the United States in the region, though they maintain ties to China as well.¹⁹⁶ Vietnam made clear that a goal of the refurbished Cam Ranh Bay deep-water anchorage was to make it available to foreign navies.¹⁹⁷ United States aircraft carriers, destroyers, and other ships already visit Vietnamese ports regularly.¹⁹⁸ The Philippines maintains more direct ties to the U.S. military: though the Philippines closed the U.S. Subic Bay Naval Station in 1992,¹⁹⁹ it remains the United States' treaty ally, and the U.S. conducted four hundred planned events with its military in 2015.²⁰⁰ During the premier joint exercise, Balikatan, "more than 15,000 U.S., Philippine, and Australian military personnel exercised operations involving a territorial defense scenario in the Sulu Sea, with personnel from Japan observing."²⁰¹

B. CHINA AND ARTIFICIAL ISLANDS

As implied by the above, one of the big sources of controversy in the South China Sea is China's construction of artificial islands, creating a

189 *Id.* at 95.

190 *Id.* at 35.

191 *Id.* at 36.

192 *Id.*

193 *Id.* at 96.

194 *Id.*

195 *Id.* at 88.

196 *Id.* at 63 (noting that "Vietnamese-Chinese military ties have developed alongside Vietnamese-American ones." Remarkably, Kaplan rationalizes Vietnam's approach by stating that "a distant water can't put out a nearby fire.").

197 *Id.* at 62.

198 *Id.*

199 *Id.* at 126.

200 Department of Defense, *supra* note 52, at 24.

201 *Id.*

security and trade risk for the United States.²⁰² China's claims over the relevant lands date back to the Xia Dynasty (2183-1752 B.C.), and they fall within the sea territory that the People's Republic of China drew in 1953 (the "nine-dash line").²⁰³ Today, China is primarily building artificial islands in the "Spratly Islands" off the coast of the Philippines and Malaysia, and in the "Paracel Islands" off the coast of Vietnam.²⁰⁴ China has produced landing strips on the Spratly islands, but claims that the land will not be militarized.²⁰⁵ Not only does the construction present security issues for the United States, neighboring countries also claim the land.²⁰⁶ The Philippines, Vietnam, Malaysia, Brunei, and Taiwan all claim sovereignty over one island in particular.²⁰⁷ This is unsurprising, considering that many countries have overlapping EEZs in the South China Sea.²⁰⁸ Even with the claims by these countries, the United States has taken no official position on the sovereignty of the artificial islands,²⁰⁹ although the Philippines initiated arbitration proceedings under UNCLOS against China, contesting the nine-dash line.²¹⁰

Through the arbitration proceedings under UNCLOS, the Philippines challenged China's historic right to the sea areas enclosed within the nine-dash line, the status of certain islands and maritime features in the region, and other actions by China that the Philippines claimed violated the convention.²¹¹ After more than three years of proceedings, the Permanent Court of Arbitration in den Hague issued its opinion in *The Republic of Philippines v. The People's Republic of China* on July 12, 2016.²¹² The opinion was a victory for the Philippines, with the Arbitration court finding that China's historic nine-dash line was without merit, that some of China's activities in the region violated UNCLOS and, most significantly, that artificial islands in the Spratly Islands are not islands under UNCLOS and therefore not entitled to the full advantages given to islands under UNCLOS, like an EEZ and territorial sea.²¹³

202 O'Rourke, *supra* note 2, at 3.

203 Yi-Hsuan Chen, *South China Sea Tension on Fire: China's Recent Moves on Building Artificial Islands in Troubled Waters and Their Implications on Maritime Law*, 1 MARSAFELAW J. 1, 18 (2015).

204 *American warship*, *supra* note 179.

205 McKirdy, *supra* note 179.

206 Chen, *supra* note 203, at 18.

207 *Id.*

208 See Silvia Menegazzi, *Military Exercises in the EEZ*, 1 MARSAFELAW J. 56, 65 (2015).

209 O'Rourke, *supra* note 2, at 29.

210 Matthew Waxman, *Legal Posturing and Power Relations in the South China Sea*, ASIA MARITIME TRANSPARENCY INITIATIVE (Jan. 21, 2015), <http://amti.csis.org/legal-posturing-and-power-relations-in-the-south-china-sea/>.

211 *Press Release: The South China Sea Arbitration* (July 12, 2016), <https://pcacases.com/web/sendAttach/1801>.

212 Republic of Philippines v. People's Republic of China, PCA Case No 2013-19, Award at 1 (Permanent Court of Arbitration), <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>.

213 Jane Perlez, *Tribunal Rejects Beijing's Claim in the South China Sea*, NY TIMES (July 12, 2016), http://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html?_r=0.

The tribunal made very clear that it did not rule on sovereignty, but rather the role of historic rights and the status of maritime features.²¹⁴ With regard to China's historic rights, the tribunal found that China had historically used the islands within the nine-dash line, but that it did not have a historic right to the resources within the water because it had not historically exercised exclusive control over the water.²¹⁵ Next, the tribunal ruled on the status of the maritime features in the region. In regards to the Spratly Islands, the tribunal ruled that because the islands have only had limited and extractive inhabitation and because they are very dependent on outside support, they cannot sustain human habitation or economic life of their own, and therefore "shall have no exclusive economic zone or continental shelf."²¹⁶

China refused to participate in the arbitration proceedings, but UNCLOS allows the court to keep jurisdiction even if one of the parties is not present, and the court ruled that it had jurisdiction in this case. Even with China not present, the court took steps to verify the Philippines' claims and requested additional written submissions during the proceedings.²¹⁷ Following the decision, and in line with its non-cooperation, China's President, Xi Jinping, essentially refused to follow the opinion of the Permanent Court of Arbitration, stating that his country's "territorial sovereignty and marine rights" would not be affected by the ruling.²¹⁸ Because China has rejected the decision, its lasting impact is still unclear.²¹⁹ However, it raises the prominence of international arbitration and also will provide support for other countries in the region as they contest the nine-dash line.²²⁰

V. ANALYSIS—THE BIG PICTURE

The South China Sea presents a storm of economic and security issues for the United States, and the country's response to China's growing economic, military, and political clout must weigh these interests. On one hand, the United States needs to preserve stability in the region to protect its economic interests. On the other hand, military threats by China may warrant a military response, but that response must be carefully measured to protect both security concerns and economic concerns. Such concerns are particularly intertwined in this area of the world. The high seas have a unique role of transporting massive quantities of goods, serving as a potential battleground, and yet (largely) are free from sovereign ownership.

214 Press Release, *supra* note 211.

215 *Id.*

216 *Id.*

217 *Id.*

218 Tom Phillips, Oliver Holmes, & Owen Bowcott, *Beijing rejects tribunal's ruling in South China Sea case*, THE GUARDIAN (July 12, 2016, 1:21 PM), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>.

219 Jerome A. Cohen, *The Wisdom of the Hague's South China Sea Decision*, THE WALL STREET JOURNAL (July 19, 2016, 11:57 AM), <http://www.wsj.com/articles/the-wisdom-of-the-hagues-south-china-sea-decision-1468943819>.

220 *Id.* See also Phillips, *supra* note 218.

This unique role is especially apparent in South East Asia: “Europe is a landscape; East Asia is a seascape.”²²¹

A. SHORTCOMINGS OF A CENTRAL BODY

While a single international body to handle any disputes that arise would be ideal, the limited success of trade agreements proposed by UNCTAD and UNCITRAL, the lack of jurisdictional teeth of the IMO, and the United States’ refusal to sign the UNCLOS agreement show that such a body is unlikely to emerge. If the history of maritime trade and security is any indication, the size of one’s navy determines how much of a voice a country has at the negotiating table, and the various U.N. organizations have not significantly changed this.²²² The world superpowers ultimately got the concession they wanted at the UNCLOS negotiations, and on the trade front, countries simply do not assent to a deal if it is not in their best interests.²²³ Finally, the IMO is more concerned with security than it was before, but warships are exempt from its most recent rules (the SUA Convention), and it is highly unlikely that the major naval powers would agree to any new rules by the IMO that limit their military operations. Again, it is important to note that the IMO does not have an enforcement mechanism for most of its rules.²²⁴

If a localized body were to emerge in Southeast Asia, the clear choice would be the existing Association of Southeast Asian Nations (ASEAN).²²⁵ With group membership consisting of ten Southeast Asian countries,²²⁶ the current formation of ASEAN was solidified when Cambodia became the tenth member state in 1999.²²⁷ The group’s stated aims and purposes, according to the ASEAN Declaration, are to “accelerate the economic growth, social progress and cultural development in the region” and to “promote regional peace and stability,” among others.²²⁸ While the group does not include China, a strengthened and unified group of Southeast Asian countries would be an effective counterbalance to rising Chinese military dominance in the region.²²⁹ As BBC reporter Bill Hayton writes, “[i]t clearly helps Vietnam and the Philippines, and to a lesser extent Brunei, Malaysia and Indonesia, if they can face China with the backing of all ten members of ASEAN.”²³⁰ The institution is gaining strength too.²³¹

221 Kaplan, *supra* note 166, at 1 (Kaplan aptly opened his book with this assertion).

222 *See generally* Zhao, *supra* note 127.

223 The “Liner Code” by UNCLOS is a good example.

224 *See* Attard, *supra* note 102, at 488.

225 Kaplan, *supra* note 166 at 174.

226 *See* ASEAN Member States, ASEAN, <http://www.asean.org/asean/asean-member-states/> (last visited Feb. 6, 2016) (noting that Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Cambodia, Laos, Myanmar (Burma), and Vietnam are the current ASEAN member states).

227 Overview, ASEAN.com, <http://www.asean.org/asean/about-asean/overview/> (last visited Sept. 6, 2016).

228 *Id.*

229 Kaplan, *supra* note 166, at 174.

230 BILL HAYTON, *THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA* (Yale Univ. Press 2014).

231 *See* Kaplan, *supra* note 166, at 174.

Its members' governments and democracies are maturing and with membership collectively representing six hundred million people and a \$1.7 trillion GDP, its voice may be heard more clearly at the international negotiating table.²³²

However, for the time being, the current naval arms race in Asia exposes the shortcomings of ASEAN. Even though the countries in the region belong to ASEAN, they are still increasing their military might and are shaping military alliances with the United States and China, the two most dominant countries in the area. These military alliances may foster a transition to a more multilateral power arrangement in the region, but for the time being they help to promote the status quo—namely, the United States policing the region through its military might.²³³

B. THE UNITED STATES' SKIN IN THE GAME AND JOINING UNCLOS

As mentioned, \$1.2 trillion in ship-borne trade goes through the South China Sea to the United States annually.²³⁴ This alone represents 6.8 percent of the United States GDP (\$17.4 trillion in 2014),²³⁵ and a disruption in that trade could harm an already tepid economic recovery.²³⁶ Further, key allies in the region (Japan, South Korea, and Taiwan) make the region important to the United States' security interests.²³⁷ While domestic and international terror attacks have garnered more attention lately, the United States cannot wait any longer to address this region head-on.

The November 2011 "Pivot to Asia," announced by the United States, shows a new willingness to address the region.²³⁸ The six "key lines of action" from the announcement of the pivot were to: reinvigorate alliances, cultivate relationships with emerging powers, develop relationships with regional multilateral bodies, work closely with Southeast Asian countries on economic issues, forge a broad-based military presence in Asia, and advance democracy and human rights.²³⁹ While the pivot was "as a strategic marketing exercise . . . staggeringly successful," it is clear that its "lines of action" are still in progress.²⁴⁰ Still, the progress made in the region (addressed above) shows that the pivot has been successful to a degree. More than anything, though, it firms up the importance of the region for the United States, and shows Washington's understanding that "if the United States loses access to those [South China Sea] waters it loses its global role and becomes just another power."²⁴¹

232 *Id.*

233 *See id.* at 175.

234 O'Rourke, *supra* note 2, at 2 n.2.

235 GDP at market prices, THE WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (last visited Sept. 6, 2016).

236 Brooks, *supra* note 98.

237 *See* Glaser, *supra* note 178.

238 Hayton, *supra* note 230, at 200.

239 *Id.*

240 *Id.*

241 *Id.* at 208.

All of this underscores the importance of the United States becoming a party to UNCLOS. Both the George W. Bush Administration and the Obama Administration have supported the United States becoming a party to the agreement,²⁴² and leading experts outline why it is in the United States' best interests to join. In his speech before the Senate Committee on Foreign Relations, John B. Bellinger III (former senior international lawyer in the Bush Administration) noted that the Bush Administration "ultimately concluded that, on balance, the treaty was clearly in the U.S. national security, economic, and environmental interests."²⁴³ Mr. Bellinger outlined that UNCLOS provided "treaty-based navigational rights for our Navy, Coast Guard, and aircraft," "codified U.S. rights to exploit the vast and valuable resources in the U.S. Exclusive Economic Zone . . . and on its substantial extended continental shelf (ECS) . . . and to engage in mining in the deep seabed outside the sovereign jurisdiction of the United States," and "supported important U.S. environmental interests."²⁴⁴ Notably, Bellinger also clarified that the concerns that the Reagan Administration had with the original treaty in regards to Part XI deep sea-bed mining had been ameliorated by later amendments to UNCLOS in 1994.²⁴⁵

Speaking in regards to the Obama Administration's support of the United States joining UNCLOS, Legal Advisor to the United States Department of State Harold Koh echoed many of the same points that the Bush Administration cited in regards to joining UNCLOS.²⁴⁶ Mr. Koh argued that signing UNCLOS would preserve the United States' sovereign rights over vast areas of the continental shelf, and would enhance national security by preserving freedom of navigation principles.²⁴⁷ Additionally, employing a more timely argument about United States foreign interests, Mr. Koh also argued that signing the treaty "would amplify our voice when we use the Law of the Sea platform to speak about the numerous maritime issues that implicate our national interests, such as the ongoing tensions in the South China Sea."²⁴⁸

Both of these advisors are right: the United States should join UNCLOS. It would give the country an internationally recognized right to utilize the resources in its own EEZ and would substantiate the United States' support of Freedom of Navigation. It would give the U.S. Navy a legitimacy in the South China Sea that goes beyond simply having the world's most powerful military. It would help the country's soft power,

242 John B. Bellinger III, *Should the United States ratify the UN Law of the Sea?*, COUNCIL ON FOREIGN RELATIONS (Nov. 11, 2014), <http://www.cfr.org/treaties-and-agreements/should-united-states-ratify-un-law-sea/p31828>. (Providing an answer to the question by Adjunct Senior Fellow for International and National Security Law John B. Bellinger III).

243 John B. Bellinger III, *The Law of the Sea Convention*, COUNCIL ON FOREIGN RELATIONS (June 4, 2012), <http://www.cfr.org/treaties-and-agreements/law-sea-convention/p28514>.

244 *Id.* at 2–3.

245 *Id.* at 3.

246 Harold Hongju Koh, *Twenty-First Century International Lawmaking*, U.S. DEPT. OF STATE (Oct. 17, 2012), <http://www.state.gov/s/l/releases/remarks/199319.htm>.

247 *Id.*

248 *Id.*

showing the rest of the world that the United States is not above the rules that it enforces.

C. DOES CHINA HAVE A RIGHT TO PATROL ITS OWN BACK YARD?

In short, yes. Under “Freedom of Transit” and “Freedom of Navigation” it is completely justified for China to want to preserve its security and economic positions.²⁴⁹ Further, China is not a rogue state like Iran, and its emergence as a global military power reminds us that “the status quo is not sacrosanct,” and its motivations may very well be noble (most notably, to protect its economic interests).²⁵⁰ But, China must understand that disrupting peace in the South China Sea would ultimately cause economic harm. As the trade figures indicate, China is extremely dependent upon its ports, and disrupting the safety and security of the shipping industry would have huge ramifications for its economy, which is already cooling down.²⁵¹ Business does not respond well to uncertainty in the market, and any threat to “transit passage” under the UNCLOS would ultimately hurt China, cutting off iron and coal for steel production (and ultimately for construction of city infrastructure), petroleum products for transportation, and the export market for manufactured goods on container ships.²⁵² China has a lot to lose, arguably the most to lose, from instability in the South China Sea.

D. AN AGREEMENT BETWEEN THE UNITED STATES, CHINA, AND REGIONAL PLAYERS

Diplomacy must be tried first. Both the United States and China have major economic skin in the game, and in the past, trade in the region has been sustained because of the security guarantee of the United States.²⁵³ While the two countries will probably continue to jockey for position by investing in new ships and aircrafts and carrying out military missions, the most effective solution would be an agreement between the two. The Trans Pacific Partnership is proof of the United States’ continued strength in the region from an economic perspective, and proof of its clout at the negotiating table.²⁵⁴ While the deal has not been officially signed by the United States, it could serve the country’s interest to have the economic backing of other countries in the region when it enters into security negotiations with China.²⁵⁵

But what would a deal between the two countries look like? James Kurth, a political scientist, hypothesizes that this deal might embody “an

249 See generally *Who Rules the Waves?*, *supra* note 37.

250 Kaplan, *supra* note 166, at 181.

251 See *Review of Maritime Transport*, *supra* note 1, at x.

252 *Id.*

253 *Who Rules the Waves?*, *supra* note 37.

254 Jackie Calmes, *Trans-Pacific Partnership Is Reached, but Faces Scrutiny in Congress*, NY TIMES (Oct. 5, 2015), http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html?_r=0.

255 See generally *id.*

explicit and effective system of mutual deterrence, based upon such concepts as red-lines, salient thresholds, and tit-for-tat actions and reactions.”²⁵⁶ However, in Congress there is skepticism that China would play by the rules to a degree that would allow for a deal like this to come to fruition. In an appendix to the 631-page Annual Report to Congress by U.S. China Economic and Security Review Commission,²⁵⁷ the “Additional Views of Commissioners Wessel and Talent, joined by Commissioners Bartholomew and Tobin” were skeptical of the United States’ current dealings with China, stating that “[t]he critical juncture we face is whether a more realistic, pragmatic, self-interested and self-assured policy will be advanced by U.S. government officials or whether they will continue to engage in endless dialogue while U.S. economic and security interests continue to be undermined.”²⁵⁸ With views of prominent congressional actors stating that negotiating with China is “endless” and “undermining” United States’ interests, it appears that a major security and economic deal with the People’s Republic of China may not be attainable in the current political climate.

Finally, the U.S. military must keep its presence in the area, and the Freedom of Navigation patrol on October 27, 2015 is a good step. If the U.S. can also help bolster the navies of the Philippines and Vietnam, potentially persuading them to also take similar Freedom of Navigation operations, it would help the United States’ position at the negotiating table, and help promote a deal that secures everyone’s economic interests in the area and does not make overly generous concessions to China.²⁵⁹

Using economic and military might, the United States may be able to reach a formal agreement for security of the South China Sea, but it will necessitate having strong economic data, knowing the contours of a flawed international maritime legal landscape, and (of course) carrying a big stick.

E. SUPPORTING ALLIES IN THE REGION, THUS REDUCING CHANCE OF MILITARY CONFLICT

If an international agreement for security in the South China Sea does not pan out, the United States’ best strategy—from both an economic and security perspective—is to continue to work with the militaries of its allies

256 James Kurth, *Confronting a Powerful China with Western Characteristics*, FOREIGN POLICY RESEARCH INSTITUTE (Jan. 1, 2012), <https://www.fpri.org/docs/media/ConfrontingAPowerfulChina.pdf>. See also Kaplan, *supra* note 166, at 181 (also quoting this hypothesized deal).

257 About Us, U.S. CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, <http://www.uscc.gov/about> (last visited Feb. 7, 2016) (according to its website, “The U.S.-China Economic and Security Review Commission was created by the United States Congress in October 2000 with the legislative mandate to monitor, investigate, and submit to Congress an annual report on the national security implications of the bilateral trade and economic relationship between the United States and the People’s Republic of China, and to provide recommendations, where appropriate, to Congress for legislative and administrative action.”).

258 *2015 Annual Report to Congress*, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION (Nov. 17, 2015), http://www.uscc.gov/Annual_Reports/2015-annual-report-congress.

259 Brooks, *supra* note 98.

in the region. The United States Department of Defense has indicated as much in its 2015 Maritime Security Strategy, noting that its current maritime security in the region is devoted to “four lines of effort: strengthening U.S. military capabilities in the maritime domain; *building the maritime capacity of our allies and partners*; leveraging military diplomacy to reduce risk and build transparency; and, strengthening the development of an open and effective regional security architecture.”²⁶⁰ One could argue that the smaller countries in the region do not need to be able to take on China in a head-to-head battle, but that they “merely need a dog and a fence in their front yard so the Chinese will hesitate before trespassing on them.”²⁶¹ That dog and fence may also be enough to protect American interests—interests that are dependent upon unfettered access to the high seas.²⁶²

The nature of maritime military conflicts, as opposed to conflicts on land, also supports a strategy of building up the militaries of smaller countries in the region. While borders on land are frequently purely political (some would say “imaginary”), a country’s coastline creates a natural border.²⁶³ Potential conflicts may be isolated to the sea, and the slow moving nature of naval warships also reduces the chances of full-on armed conflict on the high sea.²⁶⁴ A system of naval posturing through various military exercises and voyages, while not the best-case scenario, is one that can be isolated to the sea. Such posturing would likely not be labeled as “peace,” but it would not be all-out war.²⁶⁵ It is a scenario that could be stable enough to accommodate continued business and trade in the area, which is one of the primary reasons why the United States military is in the region in the first place.

The construction of military bases for use by the United States by smaller countries in the region is a good step towards increased partnership with U.S. allies in the region. Even if the United States is not a treaty partner with a country (like it is with the Philippines)²⁶⁶, increased presence of U.S. naval ships in a country helps promote freedom on the high seas. Contrary to the recent movements of China, the United States’ military efforts are designed to promote Freedom of Navigation, not to increase the size of its empire through construction of artificial islands. This is a key difference in the United States’ military strategy and one that benefits smaller countries. This mutually beneficial relationship would help to counterbalance Chinese military strength in the region and would help promote safety and security at sea. It is multi-faceted, and may come close to a boil at times, but may be the United States’ best plan to ease the

260 Department of Defense, *supra* note 52, at 19 (emphasis added).

261 Kaplan, *supra* note 166, at 130.

262 *Id.* at 201.

263 *See id.* at 6.

264 *Id.*

265 *Id.* at 178 (stating that China’s increased military spending “need not lead to war”).

266 Department of Defense, *supra* note 52, at 24.

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fundamental transition that Southeast Asia is going through, economically, militarily, and politically.

VI. CONCLUSION

The multilateral forces at play in the South China Sea show how complicated any potential solution would be. The volume and value of maritime trade in the region is sufficient to impact both individual countries and the global economy. The history of security and trade agreements shows that this is an area that has had fragmented and insufficient agreements for many years. The UNCLOS may be the major international treaty from both a security and trade perspective, but it has shortcomings with regards to artificial islands and the fact that the United States is not a party. Moreover, the increased militarization and multiple formal and informal military alliances between countries in the region adds another layer of complexity.

So what are the solutions? From the United States' perspective, it should sign UNCLOS first. This will give the country a legitimate forum to resolve disputes and will substantiate the United States' support for Freedom of Navigation. Additionally, it should seek an agreement with China to preserve Freedom of Navigation in the region, and in doing so should understand that China has a lot to lose from any threats to security in the South China Sea. If an agreement does not succeed, the United States' best option is to bolster the militaries of its allies. Working with smaller countries in the region would preserve the status quo, and thus preserve the United States' trade interests and soft power interests in the region.

